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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 594

HUMBLE OIL & REFINING COMPANY,
Petitioner,

vs.

JOHN BEN SHEPPERD, Attorney General of Texas

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 594

HUMBLE OIL & REFINING COMPANY,
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vs.

JOHN BEN SHEPPERD, Attorney General of Texas

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Summary Statement of the Matter Involved

Only one matter is involved in this petition: The constitutionality of the Texas "visitorial" statutes,[1] when considered in relation to the provisions of Section 1, Fourteenth Amendment and the Fourth Amendment to the Constitution of The United States. The "visitorial" power of a State has been generally defined by this Court:

> "As a public right, existing in the State for the purpose of examining into the conduct of the corporation with a view of keeping it within its legal powers * * *." *Guthrie* vs. *Harkness*, 199 U. S. 148, 158, 50 L. Ed. 130, 134.

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[1] Articles 1366-71 Revised Civil Statutes of Texas, 1925, and Article 431, Texas Penal Code.

By the terms of the Texas visitorial statutes [2] the Attorney General of Texas is delegated, *ex parte*, the full peremptory power of the Sovereign "to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records" of all corporations, domestic or foreign, doing business within the state, *"as often as he may deem necessary,"* (Article 1366), without any writ or other court process, and without the necessity of showing cause for such examination, or establishing the reasonableness of such demand. The statutes here involved, and here under attack, further permit the Attorney General to peremptorily and without writ or other process of the Courts "take such copies" of the records so examined *"as in his judgment"* (Article 1368) may show a violation of the charter rights and privileges of such corporation or may show a violation of any law of Texas.

The penalty provisions, under the statutes here involved, for refusing any "visitorial" demand made thereunder are two-fold: (1) Civil and (2) Criminal. The civil penalty is charter forfeiture (Article 1370), without any provision being made for *judicial* determination of the reasonableness of either the visitation demand or the refusal to accede thereto. The *fact* of demand and the *fact* of refusal, *ipso facto* gives rise to the penalty of charter forfeiture.

The criminal penalty is even more peremptory and severe (Article 431 Penal Code), for it subjects any officer of the corporation who refuses to give *immediate* access to the corporate records, on such visitation demand, to fines and jail sentences so enormous and severe as to, in effect, deny to the corporation and its officers due resort to the Courts

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[2] For full context of these laws, see pages 3-5, *ante*.

for a judicial determination of their rights under the Federal Constitution and laws.

Statement of the Basis of This Court's Jurisdiction to Review

This Court has jurisdiction to review the judgment or decree in question by virtue of the Act of Congress, June 25, 1948, C. 646, 62 Stat. 929, paragraph (3) U. S. C. A. Title 28, Sec. 1257, for there is drawn in question the validity of a State statute on the ground of its being repugnant to the Constitution of the United States, and under Rules 12 and 38 of this Court, for the State Court has decided the repugnancy question presented for review in a way which is not in accord with applicable decisions of this Court.

The statutes of Texas drawn in question are Acts of the Texas Legislature, 1907, page 34 et seq. now Articles 1366 to 1371, Revised Civil Statutes of Texas, 1925, and Article 431, Revised Penal Code of Texas, 1925, reading as follows:

REVISED CIVIL STATUTES OF TEXAS, 1925

"Article 1366. Examination

"Every corporation, domestic or foreign, doing business in Texas, shall permit the Attorney General or any of his authorized assistants or representatives, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records of said corporation as often as he may deem necessary. Acts 1907, p. 34.

"Art. 1367. Request to examine

"A written request shall be made to the president or other officer of said corporation at the time the Attorney General or his assistants desire to examine the business of said corporation. It shall be the duty of the officer or agent of any corporation to whom said

request is presented to immediately permit the Attorney General, or his authorized assistant or representative to inspect and examine all the said books, records and other documents of said corporation. Id.

"Art. 1368. Authority to examine

"The Attorney General, or any of his assistants or representatives when authorized by the Attorney General, has the power and authority to make investigation into the organization, conduct and management of any corporation authorized to do business within this State, and has authority to inspect and examine any of its said books, records and other documents, and take such copies thereof as in his judgment may show or tend to show that said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this State. Id.

"Art. 1369. Disclosures

"The Attorney General, or his authorized assistants or representatives shall not make public, or use said copies or any information derived in the course of said examination of said records or documents, except in the course of some judicial proceedings in which the State is a party, or in a suit by the State to cancel the permit or forfeit the charter of such corporation, or to collect penalties for a violation of the laws of this State, or for information of any officer of this State charged with the enforcement of its laws. Id.

"Art. 1370. Penalty

"Any foreign corporation doing business in Texas under a permit granted under the laws of this State, or any officer or agent thereof, or any domestic corporation which shall fail or refuse to permit the Attorney General, or his authorized representative or representatives, to examine or take copies of any of its said books, records, and other documents whether same be situated within this or any other State within the

United States, shall thereby forfeit its right to do business in this State; and its permit or charter shall be canceled or forfeited. Id.

"Art. 1371. Provisions cumulative

"The provisions of this chapter shall be cumulative of all other laws now in force in this State, and shall not be construed as repealing any other means afforded by law for securing testimony or inquiring into the charter rights and privileges of corporations. Id."

REVISED PENAL CODE OF TEXAS, 1925

"Art. 431 Examination of records of corporation.—If any president, vice-president, treasurer, secretary, manager, agent or other officer of any corporation doing business under permit or charter from this State shall fail or refuse to permit the Attorney General or any of his assistants or representatives who may be authorized in writing by the Attorney General to make such examination, to examine or to take copies of any or all of the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, he shall be fined not less than one hundred nor more than one thousand dollars, and be imprisoned in jail not less than thirty nor more than one hundred days. Each day of such failure or refusal shall be a separate offense. (Acts 1907, p. 35.)"

The judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas (an intermediate appellate court) was rendered on June 11, 1953 (R. 68). Motion for rehearing in that Court was overruled July 1, 1953 (R. 70). Application for Writ of Error was filed in the Supreme Court of Texas,[3] July 27, 1953 (R. 71), and was Refused October 14, 1953 (R. 93). Motion for Re-

[3] Review, by the Supreme Court of Texas, of a judgment of a Court of Civil Appeals is not a matter of right; but is discretionary with the Supreme Court of Texas. Refusal to review makes the judgment of the Court of Civil Appeals a final judgment.

hearing of Application for Writ of Error was overruled by the Supreme Court of Texas, November 18, 1953 (R. 93), and by such action the judgment of the Court of Civil Appeals became final, as the Court of last resort in Texas. This petition is filed within ninety days from November 18, 1953.

Nature of the Case

The suit was brought as an ancillary proceeding in a pending tax suit, for a declaratory judgment [4] (R. 1-13), to determine and declare the rights of Petitioner under the "unreasonable search and seizure" and "due process" and "equal protection" clauses of the Constitution of the United States, "to refuse visitation by the Attorney General, his Assistants, representatives and agents, and the copying of its records," where such demand is unreasonable and probably in violation of its Constitutional rights and guarantees, as well as to determine and declare the rights of the Attorney General, under such statutes and constitutional inhibitions, to demand forfeiture of Petitioner's charter in the event of refusal of such unreasonable demand (R. 8). The petition was filed in the Court of first instance after the Attorney General had served a "letter of visitation" (R. 9 upon Petitioner and had copied various records of Petitioner for use against Petitioner *in the pending tax suit* (R. 30).

The petition in the Court of first instance raised the Federal questions here presented for review by averring that the statutes under attack authorize the Attorney Gen-

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[4] For provisions of the Texas Uniform Declaratory Judgments Act—Acts, Texas Legislature, 1943, 48th Texas Legislature, page 265, Chapter 164—see Appendix "A", attached. This Act is substantially the same as the Federal Declaratory Judgment Act—Acts of Congress, June 25, 1948, C646, 62 Stat. 964, Amended May 24, 1949, C139, par. 11, 63 Stat. 105. For context of the Federal Act, see Appendix "B". Hence an action of the nature here brought is within the contemplation of Federal law and practice, and, therefore, within the scope of this Court's jurisdiction.

eral to make, and the Attorney General by virtue of the authority claimed by him under the statutes had made, an "unreasonable search and seizure" of Petitioner's records in denial of Petitioner's rights "of due process of law and equal protection of the laws, in contravention of its rights and privileges *under the Constitution of the United States* . . ." (R. 7).

This visitation was acceded to and the records of Petitioner were copied by the Attorney General as a result of threats that *quo warranto* proceedings would be filed to forfeit Petitioner's charter, in the event of refusal (R. 29). The Court of first instance upheld the constitutionality of the statutes and the Attorney General's acts thereunder, by rendering judgment against Petitioner (R. 24). By the findings of fact, filed in the trial court, however, it was judicially determined that:

> (1) The drastic penalties provided in the law are such as are contemplated to and do, in fact, break the will of the corporation's officers to resist such demands, be they reasonable or unreasonable, lawful or unlawful, and prevents a corporation and its officers from seeking the protection of and redress in the Courts (R. 30).
>
> (2) The drastic penalties provided in the law are such as to deprive a corporation's officers of the right to exercise their own free judgment on the question of compliance or noncompliance, and creates a deterrent to resort to the Courts for a determination of its rights under the Constitution and laws (R. 31).
>
> (3) The drastic penalties provided in the law are such as to bring about submission to the demands of the Attorney General, rather than to seek redress in and protection from the Courts (R. 31).
>
> (4) That the penalties involved are so drastic, severe, and, therefore, unjust, as to render it inequitable for Petitioner "to be required to assume the burden" of having such drastic penalties assessed against it, if, after resorting to the Courts for redress,

it be judicially determined that Petitioner's contentions be wrong (R. 31).

On appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas (sitting at Beaumont, Texas), the Federal questions were preserved and carried forward in Petitioner's "Points Relied Upon for Reversal" (R. 37 and 38, and 43).[5] That Court approved and upheld the trial court's finding of fact,[6] (R. 25), but, nevertheless held the statutes to be valid as against Petitioner's contentions of unconstitutionality (R. 62). The Court of Civil Appeals, however, only considered and passed upon the validity of the statutes insofar as Petitioner's attack was levelled against a violation of the "unreasonable search and seizure" clause of the Fourth Amendment to the Federal Constitution. While the Court of Civil Appeals fully recognized that Petitioner was attacking the statutes' validity under the "due process" and "equal protection" clauses of the Fourteenth Amendment[7] (R. 51), it failed and refused to consider or pass upon Petitioner's contentions thus urged, in either its original opinion (R. 47) or as a result of Petitioner's Motion for Rehearing (R. 69), which was overruled (R. 70). This latter motion fully

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[5] Under Texas practice the Assignments of Error are not separately filed, but appear only in Appellant's brief as "Points Relied Upon for Reversal." Hence the incorporation of such points from Petitioner's brief in the Court of Civil Appeals.

[6] Under Texas law, the Courts of Civil Appeals have final authority on questions of fact. The Supreme Court of Texas has jurisdiction only on questions of law.

[7] In speaking of the matters raised by Petitioner for adjudication in its trial pleading the Court said: "It was also alleged that the records were obtained from Humble under duress and threats of charter forfeiture and that the acts of the Attorney General constituted an unreasonable search and seizure and a denial to the appellant Humble Company of due process of law and equal protection of law under both the constitution of the United States and the constitution of the State of Texas." (R. 51).

raised and urged such contention (R. 69). The Assignments of Error on Motion for Rehearing in the Court of Civil Appeals are as follows:

"First Assignment of Error

"This Court erred in failing and in refusing to consider and rule upon Appellant's contention, timely urged, that the Statutes under attack are in violation of Appellant's rights under the Constitution of The United States, guaranteeing Appellant equal protection under the law, as provided in Section 1, Fourteenth Amendment to the Constitution of The United States of America.

"Second Assignment of Error

"This Court erred in failing and in refusing to rule that the penalty provisions of Articles 1370, Revised Civil Statutes of Texas, 1925, and Article 431, Penal Code of Texas, are so drastic, harsh and severe as to deny Appellant due resort to the Courts of this State and of the United States, thus contravening the guarantee of equal protection under the law, provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America.

"Third Assigment of Error

"This Court erred in holding, and in entering its judgment based thereon, that Articles 1366-1371, Revised Civil Statutes of Texas, are valid and are not in violation of and do not contravene the provisions of the Constitution of Texas and the Constitution of The United States of America."

The Federal Constitutional questions were presented to the Supreme Court of Texas in Petitioner's Application for Writ of Error, filed in that Court (R. 71), and that Court refused to review the judgment of the Court of Civil Appeals, and thereby refused to consider and pass upon the

Federal questions raised. The Assignments of Error in Petitioner's Application to the Supreme Court of Texas (R. 73) followed the Assignments in the Court of Civil Appeals on Motion for Rehearing and read as follows:

"First Point

"The Court of Civil Appeals erred in failing and in refusing to consider and rule upon Petitioner's contention, timely urged, that the statutes under attack are in violation of Petitioner's rights under the Constitution of the United States, guaranteeing Petitioner equal protection under the law, as provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America. (Same as, and germane to the First Assignment of Error, Appellant's Motion for Rehearing in the Court of Civil Appeals).

"Second Point

"The Court of Civil Appeals erred in failing and in refusing to rule that the penalty provisions of Article 1370, Revised Civil Statutes of Texas, 1925, and Article 431, Penal Code of Texas, are so drastic, harsh and severe as to deny Petitioner due resort to the Courts of this State and of the United States, thus contravening the guarantee of equal protection under the law, provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America. (Same as, and germane to the Second Assignment of Error, Appellant's Motion for Rehearing in the Court of Civil Appeals.)

"Third Point

"The Court of Civil Appeals erred in holding, and in entering its judgment based thereon, that Articles 1366-1371, Revised Civil Statutes of Texas, 1925, are valid and are not in violation of and do not contravene the provisions of the Constitution of Texas and the Constitution of the United States of America. (Same

as, and germane to the Third Assignment of Error, Appellant's Motion for Rehearing in the Court of Civil Appeals)."

The rulings of the Court of first instance, the intermediate appellate court and the Supreme Court of Texas give this Court jurisdiction, because "the validity of a State statute is drawn in question on the ground of being repugnant to the Constitution . . . of the United States." (Acts of Congress, June 25, 1948, C. 646, 62 Stat. 929), and the rulings of all the Texas Courts have upheld the statutes against the charge of repugnancy.

The cases sustaining this Court's jurisdiction are: *Ex Parte Young,* 209 U. S. 123, *Wadley Southern Railway* v. *Georgia,* 235 U. S. 651,*Oklahoma Operating Company* v. *Love,* 252 U. S. 331, and *St. Louis etc. Ry. Co.* v. *Williams,* 251 U. S. 63; also *Hale v. Hinkel,* 201 U. S. 43, 26 S. Ct. 270, 50 L. Ed. 652, *Silverthorne Lumber Co.* v. *U. S.,* 251 U. S. 385, *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, *Federal Trade Commission* v. *Baltimore Grain Co.,* 284 Fed. 886, affirmed 267 U. S. 586 (Per Curiam), *Cudahy Packing Company* v. *U. S.* 15 Fed. (2) 133.

The Federal question is a substantial one, for the Texas Courts have held, factually, that the statutes drawn in question have the effect of placing Petitioner (and all corporations) in a position where they fear resort to the Courts of both the State and Nation to seek redress and protection, thus denying to them both "due process of law" and "equal protection of the law," where a visitation demand is made which is both unreasonable and unconscionable, for if resort be made to the Courts for a judicial determination of the reasonableness of the visitation demand, and the Courts ultimately hold against Petitioner, while the appeal to the Courts may have been justifiable and in good faith, the corporation faces charter forfeiture and its officers face in-

determinate fines and jail sentences of almost ridiculous magnitude. To illustrate: If a corporate officer wished only to submit to his legal advisers the question of necessity for compliance with a "visitation" demand, which appeared to be clearly unreasonable, and it took only *one week* for the corporation's lawyer to give an opinion on the matter, the corporation's charter is subject to forfeiture and the officer making the refusal, pending legal advice, would subject himself to a sentence of *two* (2) *years* in jail and a fine of Seven Thousand Dollars ($7,000.00). And, if, upon advice of counsel the demand is refused, pending a good faith appeal to the Courts for a determination of the reasonableness of the demand, or the constitutionality of the demand for the purposes made, and the matter could run the gauntlet of the Courts in only one year—a violent assumption—in addition to complete charter forfeiture, the corporate officer, acting on advice of counsel, would subject himself to sentence of One Hundred (100) *years* in jail and a fine of Three Hundred Sixty Five Thousand Dollars ($365,000.00).

These severe and unconscionable penalties explain the reason for the failure of any corporation to level an attack against the statutes for the nearly fifty years they have been on the statute books of Texas, as pointed out by the Court of Civil Appeals (R. 65). It is only by virtue of fortuitous circumstances that Petitioner, after complying, under duress, with the Attorney General's demands, was able to draw the statutes in question in this proceeding without subjecting itself and its officers to the penalties provided. The same fortuitous circumstances may never again occur.

The Question Presented

Are the Texas statutes in violation of the "due process" and "equal protection" clauses of Section 1, Fourteenth

Amendment to the Constitution of the United States, because they provide such harsh, severe and unconscionable penalties that a corporation is effectively denied a good faith resort to the Courts of Texas and the United States to determine the reasonableness of a search and seizure thereunder, when viewed from the standpoint of the provisions of Article 1, Section 9, Fourth Amendment to the Constitution of the United States, inhibiting *unreasonable* searches and seizures?

Reasons for Allowance of the Writ

First

The writ should be allowed in order that this Court may review the Texas Statutes in the light of the Findings of Fact made by the Texas Courts, that it may be determined if the statutes drawn in question violate the rule long adhered to by this Court that a State Statute which assesses such severe and enormous penalties that it operates to deprive a person or corporation from resort to the Courts for redress and relief is just as unconstitutional and, therefore, void, as one would be which affirmatively denied the right of court review.

Second

If the statutes drawn in question have the effect of bringing about docile submission to the demands made under it, because of fear of the consequences if judicial relief is sought and denied, then Petitioner, and all other corporations doing business in Texas are effectively denied "due process" and "equal protection" under the Fourteenth Amendment to the Federal Constitution, for they are effectively stopped at the threshold from seeking the protection of our Courts against *unreasonable searches* and *seizures*, which are prohibited by the Fourth Amendment to the Constitution of the United States.

WHEREFORE, Petitioner prays that a writ of certiorari issue in this cause, directed to the Court of Civil Appeals, for the Ninth Supreme Judicial District of Texas, sitting at Beaumont, Texas, where the official possession of the record now reposes, and that, upon hearing in this Court, a judgment be entered holding the State statutes here drawn in question for review, to be violative of and repugnant to the Constitution of the United States, and, therefore, unenforceable and void. Petitioner prays for such other and additional relief, both in law and in equity as may appear to this Court to be meet and proper in the premises.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 594

HUMBLE OIL & REFINING COMPANY,
Petitioner,

vs.

JOHN BEN SHEPPARD, ATTORNEY GENERAL OF TEXAS

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court Below

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas is reported in 259 S.W. (2) 580. It appears in the Record before this Court, at page 47. There is no opinion by the Supreme Court of Texas, since its order denying writ of error was peremptory and negative in nature, being a mere refusal to act.

The Court's Jurisdiction

This Court has jurisdiction to review the judgment or decree in question:

1

By virtue of the Act of Congress, June 25, 1948, C. 646, 62 Stat. 929, paragraph (3) U.S.C.A. Title 28, Section 1257, for there is drawn in question the validity of a State statute

on the ground of its being repugnant to the Constitution of the United States, and the State Courts have held the statutes so attacked to be valid.

2

By virtue of Rules 12 and 38 (5)a of this Court, for the State Court has decided a substantial Federal question in a way which is not in accord with applicable decisions of this Court, as pointed out in subsequent portions of this brief.

3

The judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas was rendered and filed on June 11, 1953 (R. 68). Motion for rehearing in that Court was overruled July 1, 1953 (R. 70). Application for a writ of error was filed in the Supreme Court of Texas on July 27, 1953 (R. 71) and was refused by that Court on October 14, 1953 (R. 93). Motion for a rehearing of Petitioner's Application for Writ of Error was overruled by the Supreme Court of Texas on November 18, 1953 (R. 93), and, by such action the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas became a final judgment, and a judgment by a court of last resort.

4

The petition in the Court of first instance raised the Federal questions here presented for review (R. 1). The Court of first instance held the statutes here drawn in question to be valid in the face of Petitioner's charge of repugnancy to the Federal Constitution (R. 32). The Federal questions were preserved and urged in the Court of Civil Appeals (R. 37-46). That Court affirmed the court of first instance in its holding that the statutes were not

repugnant to the Federal Constitution, as charged (R. 62), although that Court did refuse to consider or pass upon Petitioner's contention of repugnancy in the light of the "due process" and "equal protection" clauses of the Fourteenth Amendment (R. 63). This holding was assigned as error in Petitioner's motion for rehearing in the Court of Civil Appeals (R. 69). The motion for rehearing was overruled (R. 70). On application to the Supreme Court of Texas for a writ of error to review the judgment of the Court of Civil Appeals, the same Federal questions were urged. The points so presented to the Supreme Court of Texas for review were as follows:

First Point

The Court of Civil Appeals erred in failing and in refusing to consider and rule upon Petitioner's contention, timely urged, that the statutes under attack are in violation of Petitioner's rights under the Constitution of the United States, guaranteeing Petitioner equal protection under the law, as provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America. (Same as, and germane to the First Assignment of Error, Appellant's Motion for Rehearing in the Court of Civil Appeals.) (R. 73.)

Second Point

The Court of Civil Appeals erred in failing and in refusing to rule that the penalty provisions of Article 1370, Revised Civil Statutes of Texas, 1925, and Article 431, Penal Code of Texas, are so drastic, harsh and severe as to deny Petitioner due resort to the Courts of this State and of the United States, thus contravening the guarantee of equal protection under the law, provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America. (Same as, and germane to the Second Assignment of Error, Appellant's Motion for Rehearing in the Court of Civil Appeals. (R. 73).

Third Point

The Court of Civil Appeals erred in holding, and in entering its judgment based thereon, that Articles 1366-1371, Revised Civil Statutes of Texas, 1925, are valid and are not in violation of and do not contravene the provisions of the Constitution of Texas and the Constitution of the United States of America. (Same as, and germane to the Third Assignment of Error, Appellant's Motion for Rehearing in the Court of Civil Appeals.) (R. 73.)

The Supreme Court of Texas refused to issue its writ of error and review the decision of the intermediate Court (R. 93). Motion for rehearing of Petitioner's Application for Writ of Error was filed. (R. 90.) This was overruled, (R. 93), and the judgments of the Court of first instance and the intermediate appellate Court holding the statutes valid against the charge of repugnancy became final, and is now a judgment by the highest Court of the State of Texas is which a decision could be had.

In holding the statutes drawn in question to be valid as against the charge of repugnancy to the Federal Constitution, the State Courts have decided a substantial Federal question in a way which is not in accord with the following applicable decisions of this Court (Rule 38(5)a): *Ex Parte Young,* 209 U.S. 123, *Wadley Southern Railway* v. *Georgia,* 235 U.S. 651, *Oklahoma Operating Company* v. *Love,* 252 U.S. 331, and *St. Louis etc. Ry. Co.* v. *Williams,* 251 U.S. 63; also *Hale* v. *Hinkel,* 201 U.S. 43, 26 S. Ct. 270, 50 L. Ed. 652, *Silverthorne Lumber Co.* v. *U.S.,* 251 U.S. 385, *Federal Trade Commission* v. *American Tobacco Co.,* 264 U.S. 298, *Federal Trade Commission* v. *Baltimore Grain Co.,* 284 Fed. 886, affirmed 267 U.S. 586 (Per Curiam), *Cudahy Packing Company* v. *U.S.,* 15 Fed. (2) 133.

Statement of the Case

The opinion of the Court of Civil Appeals (R. 47), 259 S.W. (2) 580, is complete in stating the facts; but, because of the unusual length of the opinion we adopt its statement of the facts giving rise to this suit without copying and repeating them here.

The trial court's Findings of Fact constitute as concise and succinct a statement of the case as can possibly be made. We here set them out in abridged form, adopting them, and refer the Court to Appendix "B" where they are set forth in *haec verba,* as they appear in the Record, pp. 26-32.

> "At the time of filing this suit there was, and had been for many months, and there is now, pending on the docket of this Court a suit styled: Humble Oil & Refining Company vs. Montgomery County, Texas, et al, and numbered 4787.
>
> "In the suit referred to, plaintiff seeks injunctive relief, to prevent the enforcement of certain tax assessments and the collection thereof for the year 1950, on the averment that said assessments are void and invalid. Though not an original party to said suit, the State of Texas, acting through her duly elected, qualified and acting Attorney General, Price Daniel, became a voluntary party, by filing therein a petition in intervention, and the Court aligned the State as a party defendant therein.
>
> "The aforementioned suit has heretofore been set for trial by this Court, for November 5, 1952, and, on or about October 7, 1952, the defendant herein, Price Daniel, purporting to act in his official capacity as Attorney General of Texas, and in behalf of The State of Texas, delivered to plaintiff herein a written demand for inspection of plaintiff corporation's books and records, and through his duly appointed, qualified and acting agent and representative demanded of plaintiff copies of such books and records, specifically stating what records he desired.

"The demand for inspection of plaintiff's books and records was not made by defendant for the purpose of investigation into the organization, conduct and management of plaintiff corporation; but was made solely for the purpose of ascertaining if plaintiff's files, books and records contained any evidence or information of value to the defendants in the tax suit, and to obtain access to such evidence and information, if any, and to render such evidence and information available to said defendants if evidence or information of value were found.

"The inspection and examination of plaintiff's files, books and records which followed such demand was made for the sole purpose of obtaining information and evidence for use by the State in the trial of the tax suit, aforesaid.

"Defendant, Price Daniel, did not demand or take the copies of the records because, in his judgment, or in the judgment of any of his agents, assistants or representatives such copies showed or tended to show that plaintiff corporation has been or is now engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this state; but such copies were demanded and taken, solely for the purpose of using the same as evidence in the pending tax suit, and, for use in making further investigation as the basis of acquiring additional information for use in the tax suit aforesaid.

"No issue is raised in the tax suit against Montgomery County which would involve plaintiff corporation in a violation of any criminal law of this state; nor is any issue raised involving plaintiff corporation in a violation of any of its charter rights and privileges. On the contrary said cause involves only issues relating to civil relief to which plaintiff corporation contends that it is entitled, under the Constitution and laws of Texas and the United States.

"Plaintiff corporation, through its duly constituted authority, registered with defendant its objections to both the demand for inspection of its books and records

and the demand for the copies of its records; whereupon defendant, through his first assistant, thereunto duly authorized, threatened to file a proceeding against plaintiff corporation seeking a forfeiture of plaintiff's charter, under the provisions of and by authority granted in Article 1370, R. C. S. of Texas, unless both the demand for inspection and copying of plaintiff's records were acceded to.

"Such threat involved such drastic penalties as to break down the will of plaintiff's officers to resist such demands so made, and deprived such officers of the right to exercise their own free judgment on the matter of refusing to comply with the demands. In short, plaintiff's officers were led to believe, and in the court's opinion did believe, that if they failed to comply with defendant's demands and through fear of the consequences if they were wrong in their belief that they could lawfully refuse to comply therewith, permitted the Attorney General to impose his will upon them, in lieu of exercising their own free judgment.

"Under fear, as a result of the threat referred to, the officers of plaintiff corporation permitted the inspection of its books and records demanded by the Attorney General in his letter of October 7, 1952, and the Attorney General's representative was given access to all of plaintiff's books and records as demanded.

"Under such fear, as a result of the threats theretofore made, the officers of plaintiff corporation permitted the copying of the records and delivered such copies to the defendant through his representative duly appointed for that purpose; plaintiff's officers at the time of such inspection and at the time of delivering such copies stating to defendant's representative and to defendant himself, that compliance with such demands was under duress and compulsion and with the right reserved of seeking redress through the Courts of this State.

"I find that defendant did intend to bring *quo warranto* proceedings, seeking forfeiture of plaintiff's charter if plaintiff's officers refused to comply with defendant's demands; and I further find that plaintiff's

officers believed, in good faith, that such action would be taken, otherwise they would have refused to comply with such demands.

"I further find that the penalty of charter forfeiture is so drastic and severe that it prevented plaintiff's officers from exercising their own free will, and prevented them from assuming the burden of refusing compliance with defendant's demands, without first appealing to the courts to declare and define its rights, as well as the rights of the Attorney General under Articles 1366-71, R. C. S. of Texas, 1925.

"I find that it would be inequitable and unjust for plaintiff to be required to assume the burden of suffering the possibility of charter forfeiture if its officers be wrong in their belief that they are not required to comply with demands made by defendants under the facts here stated and by me found. In this connection, I find that plaintiff's officers are in good faith in their bona fide belief that the defendant's demands are unauthorized by statute and in excess of defendant's lawful authority.

"The records of which copies were demanded from plaintiff and received by defendant as well as the copies themselves are valuable records, constitute, in part, plaintiff's stock in trade, are confidential in nature and are, in truth and in fact valuable property, title to which is vested in plaintiff alone."

Specifications of Errors

We here adopt as the specification of errors before this Court, the errors pointed out to the Supreme Court of Texas in our Application for Writ of Error. (R. 73). They are as follows:

First

"The Court of Civil Appeals erred in failing and in refusing to consider and rule upon Petitioner's contention, timely urged, that the statutes under attack are in violation of Petitioner's rights under the Constitution of the United States, guaranteeing Petitioner equal pro-

tection under the law, as provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America.

Second

"The Court of Civil Appeals erred in failing and in refusing to rule that the penalty provisions of Article 1370, Revised Civil Statutes of Texas, 1925, and Article 431, Penal Code of Texas, are so drastic , harsh and severe as to deny Petitioner due resort to the Courts of this State and of the United States, thus contravening the guarantee of equal protection under the law, provided for in Section 1, Fourteenth Amendment to the Constitution of the United States of America.

Third

"The Court of Civil Appeals erred in holding, and in entering its judgment based thereon, that Articles 1366-1371, Revised Civil Statutes of Texas, 1925, are valid and are not in violation of and do not contravene the provisions of the Constitution of Texas and the Constitution of the United States of America."

ARGUMENT

Point One

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED, FOR, AS A RESULT OF THE STATE STATUTE DRAWN IN QUESTION, PETITIONER IS DENIED THE RIGHT OF COURT REVIEW, (AND, THEREFORE, DUE PROCESS AND EQUAL PROTECTION OF LAW) TO DETERMINE IF A VISITATION DEMAND MADE BY THE ATTORNEY GENERAL OF TEXAS IS IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION TO PROTECTION FROM UNLAWFUL SEARCHES AND UNLAWFUL SEIZURES.

Point Two

THE FEDERAL QUESTION PRESENTED HAS BEEN DECIDED BY THE HIGHEST COURT OF THE STATE OF TEXAS IN WHICH A DECISION COULD BE HAD, CONTRARY TO APPLICABLE DECISIONS OF THIS COURT, FOR THE TEXAS COURT, THOUGH JUDICIALLY DETERMINING AND HOLDING THAT THE STAT-

UTES DRAWN IN QUESTION DO, IN TRUTH AND IN FACT, EFFECTIVELY DENY PETITIONER THE RIGHT OF COURT REVIEW TO DETERMINE ITS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES, NEVERTHELESS HELD THE STATUTES TO BE VALID AS AGAINST PETITIONER'S CONSTITUTIONAL ATTACK.

POINT THREE

A CORPORATION, THOUGH A CREATURE OF THE STATE, IS NEVERTHELESS PROTECTED IN ITS CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE, AND STATE LAWS WHICH HAVE THE EFFECT OF NULLIFYING SUCH PROTECTION ARE UNCONSTITUTIONAL AND VOID, AS IN VIOLATION OF THE GUARANTEES OF "DUE PROCESS" AND "EQUAL PROTECTION" OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Summary of the Argument

The statutes drawn in question (Petition, p. 3-5, *supra*), admittedly provide for a *search* and a *seizure* of Petitioner's records. Petitioner's records, admittedly, were searched and some were seized (R. 35). The seizure was adjudicated by the Texas Courts to have been unlawful (R. 67). The State Courts have held that the search and unlawful seizure were both accomplished through threats by the Attorney General of Texas to invoke the penalties provided by the law, which the State Courts have held to be "so drastic and severe that it prevented plaintiff's officers from exercising their own free will, and prevented them from assuming the burden of refusing compliance with defendant's demands, without first appealing to the Court" (R. 57). The State Courts have found and adjudicated that the penalty provisions are "inequitable and unjust," (R. 57), and that the papers seized "are valuable records, constitute, in part, plaintiff's stock in trade, are confidential in nature and are, in truth and in fact *valuable property*"[8] (R. 58).

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[8] Emphasis ours, unless otherwise noted.

Any peremptory search and any seizure of "valuable property" conducted by *ex parte* demand, and without process issued out of a court, carries with it the potential of "unreasonableness" in the sense that such are prohibited by the Fourth Amendment to the Federal Constitution, for:

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny." *In Re Pacific Railway Commission,* 32 Fed. 241, (cited by this Court many times with approval).

The question of *reasonableness* or *unreasonableness* of a search and seizure, under the Constitution and laws is *always* one for judicial determination. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *United States* v. *Invader Oil Corporation,* 5 Fed. (2) 715.

If, therefore, a State, by statute, authorizes a search and seizure of records or property, independent of any process from the courts, and prescribes penalties for failure to submit to such search and seizure which are so harsh and drastic that an aggrieved party will submit rather than risk the infliction of the penalties so prescribed, the protection afforded by the Fourth Amendment to the Federal Constitution is effectively nullified. For that reason, this Court has consistently held such statutes to be unconstitutional and void, for

> "It may, therefore, be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms *prohibited the company from seeking judicial*

construction of laws which deeply affect its rights." Ex Parte Young, 209 U. S. 123.

Every "visitation" demand made by the Attorney General of Texas, under authority of the offending statutes, without process of the Courts, is pregnant with possibilities of unreasonableness. In all *bona fide* contentions of unreasonableness in the light of the Fourth Amendment to the Federal Constitution, Petitioner is entitled to a judicial determination of that issue. Yet, by virtue of the harsh and drastic penalties prescribed by Texas law when refusal is made, Petitioner is denied the constitutional protection to which it is entitled, because of fear that a resort to the Courts will result in the infliction of such penalties if it has not correctly prejudged its rights. On this point, this Court has already spoken thus:

> "A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an ex post facto law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders,[9] before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question.[10] He must either obey what may finally be held to be a void order,[11] or disobey what may ultimately be held to be a lawful order.[12] If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably

[9] As an order of "visitation" from the Attorney General of Texas, See p. 48 Record for the "command" in the case at bar.

[10] As distinguished from a judicial determination as contemplated by the Fourth Amendment.

[11] Thus nullifying this protection afforded by the Constitution against unreasonable search and seizure.

[12] And, under the Texas statutes, suffer charter forfeiture, and the payment of enormous fines and suffer severe jail penalties for the corporate officers.

would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid. *Wadley Southern Railway* vs. *Georgia,* 235 U. S. 651."

See also *Oklahoma Operating Company* v. *Love,* 252 U. S. 331 and *St. Louis etc. R. Co.* v. *Williams,* 251 U. S. 63.

Nor can the statutes under attack be justified, on constitutional grounds because they apply only to corporations. No case, State or Federal can be found sustaining a statute or statutes as broad as the ones now under attack. Nor can any case be found which sustains acts which are so manifestly in violation of constitutional guarantees as those of which we now complain. On the other hand, the Courts have consistently protected corporations in their constitutional rights against unreasonable search and seizure, the same as individuals. *Hale* v. *Hinkel,* 251 U. S. 43; *Silverthorne Lumber Co.* v. *U. S.,* 251 U. S. 385; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298; *Federal Trade Commission* v. *Baltimore Grain Co.,* 284 Fed. 886, affirmed 267 U. S. 586 (Per Curiam); *Cudahy Packing Co.* v. *U. S.,* 15 Fed. 2d 133.

The provisions of the search and seizure clause and the due process and equal protection clauses of the Federal Constitution give rights that are interrelated in character—under the former there exists a guarantee against unreasonable searches and seizures while under the latter there is a guarantee that there shall be no interference with the due enforcement of the former. The constitutional guarantee against unreasonable search and seizure is, indeed, a farce, a sham, and a tragic hoax, if a State, by local legislation, can make the enforcement of that right, in the duly constituted courts of the land, such a dangerous enterprise that one whose rights have been ruthlessly invaded would prefer to suffer the infringement of those rights, rather

than take the chance of imposition of unconscionable penalties set up by the State, obviously for the very purpose of acting as a deterrent to the enforcement of Constitutional guarantees.

The point of attack here levelled against the offending statutes is not related so much to the question of whether or not the search and seizure in the instant case was an unreasonable search and seizure under the Federal Constitution as it is, whether or not, the State statutes are so designed and enacted as to prevent or deter Petitioner from obtaining, a *judicial,* and, therefore, lawful determination of its rights under the unreasonable search and seizure clauses of the Federal Constitution. The State Courts have held that the copying of Petitioner's records by the Attorney General of Texas was, IN FACT an unlawful seizure of Petitioner's property. They ordered the confiscated property returned. The State Courts have further held that the penalties of the law are such as to cause the corporate officers to submit to this and any other unlawful search and seizure rather than appeal, by due resort to the Courts, for protection of their constitutional rights. The attack here made is more directed to the penalty provisions of the law which can have no other effect than deny Petitioner, at all times, *in presenti* and *in futuro,* the right of free and unrestrained resort to the Court for *judicial* determination of the reasonableness of any demand for search and seizure; for the statutes here drawn in question stad as a continuing obstacle to the free, unrestrained exercise of Petitioner's right to a determination by the Courts of the reasonableness or unreasonableness of any and all searches and seizures made by the Attorney General of Texas, acting under his own—*and not a Court's*—interpretation of the authority granted him under the law. In the case at bar the Texas Courts have definitely held that his *ex parte* determination

of his rights in this instance were unlawful and in violation of constitutional inhibitions.

Obviously, therefore, we do not present a theoretical, suppositious case of what *could*, under varying circumstances, happen because of the provisions of the offending statutes; but rather, we present a case where the Texas Court has affirmatively held that the statute is not only pregnant with abuses, but has brought about, in the case at bar, a definite invasion of Petitioner's Federal rights—but which Court has refused to strike the statute down as being repugnant to the source from which those Federal rights derive.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its powers to review the judgment of the Texas Court, in order that the statutes here attacked may be held to be repugnant to the provisions of the Constitution of the United States, and, therefore, unenforceable and void; and, to such end a writ of certiorari should be granted and this Court should review the decision of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, sitting at Beaumont, Texas, and finally reverse it, insofar as its decision upholds the validity of the statutes here under review, against the contention that such statutes are repugnant to the provisions of the Constitution of the United States.

HUMBLE OIL & REFINING COMPANY,
By FELIX A. RAYMER,
Counsel for Petitioner.

REX G. BAKER,
FRANK L. HEARD, JR.,
K. W. GILMORE,
Of Counsel.

APPENDIX "A"

PERTINENT SECTIONS OF THE TEXAS UNIFORM DECLARATORY JUDGMENTS ACT

"Article 2524—1. Uniform Declaratory Judgments Act

Scope

"Section 1. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Power to construe, etc.

"Sec. 2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a Statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, Statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Before breach

"Sec. 3. A contract may be construed either before or after there has been a breach thereof.

Executor, etc.

"Sec. 4. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

"(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

"(b) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

"(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Enumeration not exclusive

"Sec. 5. The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Discretionary

"Sec. 6. The Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Review

"Sec. 7. All orders, judgments, and decrees under this Act may be reviewed as other orders, judgments, and decrees.

Supplemental relief

"Sec. 8. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a Court having jurisdiction to grant the relief. If the application be deemed sufficient, the Court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Jury trial

"Sec. 9. When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are

tried and determined in other civil actions in the Court in which the proceeding is pending.

Costs

"Sec. 10. In any proceeding under this Act the Court may make such award of costs as may seem equitable and just.

Parties

"Sec. 11. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the Statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

Construction

"Sec. 12. This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

Words construed

"Sec. 13. The word 'person,' wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

Provisions severable

"Sec. 14. The several Sections and provisions of this Act, except Sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the Act invalid or inoperative.

Uniformity of interpretation

"Sec. 15. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Short title

"Sec. 16. This Act may be cited as the Uniform Declaratory Judgments Act. Acts 1943, 48th Leg., p. 263, ch. 164."

APPENDIX "B"

PERTINENT SECTIONS OF THE FEDERAL DECLARATORY JUDGMENT ACT

"Chapter 151—DECLARATORY JODGMENTS

"Sec.
"2201. Creation of remedy.
"2202. Further relief.

"§ 2201. Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, § 111, 63 Stat. 105.

"§ 2202. Further relief.

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964."

APPENDIX "C"

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL DISTRICT COURT OF SAN JACINTO COUNTY FOR THE NINTH JUDICIAL DISTRICT OF TEXAS.

"No. 4787—Ancillary

"HUMBLE OIL & REFINING COMPANY, PLAINTIFF

vs.

PRICE DANIEL

"In response to Plaintiff's Request therefor, filed herein on November 10th, 1952, I now make, announce and file herein, the following as my Findings of Fact and Conclusions of Law:

"Finding No. 1

"At the time of filing this suit there was, and had been for many months, and there is now, pending on the docket of this Court a suit styled: Humble Oil & Refining Company vs. Montgomery County, Texas, et al, and numbered 4787, which suit was originally filed in the Special District Court of Montgomery County, for the Ninth Judicial District of Texas, and was numbered thereon, 19,695. Said cause was, on application for change of venue, filed by plaintiff, transferred to this Court and this County for trial.

"Finding No. 2

"In the suit referred to in Finding No. 1, plaintiff seeks injunctive relief, to prevent the enforcement of certain tax assessments and the collection thereof for the year 1950, on the averment that said assessments are void and invalid. Though not an original party to said suit, the State of Texas, acting through her duly elected, qualified and acting Attorney General, Price Daniel, became a voluntary party, by filing therein a petition in intervention, and the Court aligned the State as a party defendant therein.

"Finding No. 3

"The aforementioned suit has heretofore been set for trial, by this Court, for November 5, 1952, and, on or about October 7, 1952, the defendant herein, Price Daniel, purporting to act in his official capacity as Attorney General of Texas, and in behalf of The State of Texas, delivered to plaintiff herein a written demand for inspection of plaintiff corporation's books and records, and through his duly appointed, qualified and acting agent and representative demanded of plaintiff copies of such books and records, specifically stating what records he desired copies of; the copies demanded being as follows:

1. Annual estimates made by Humble of the recoverable oil reserves under its properties in the Conroe Field, Montgomery County, Texas, each year 1945 through 1950.

2. Humble's estimate of ultimate recoverable oil reserves in the Conroe Field.

3. Humble's cost of producing oil in Conroe Field 1945 through 1950, including lifting costs.

4. A showing of the original cost, depreciation and present book value of:

a. Humble's gasoline plant in the Conroe Feld.

b. Humble's production equipment in the Conroe Field.

c. Humble's Conroe campsite.

5. Inventory of Humble's oil in storage in Montgomery County, January 1, 1950.

6. Humble's files and records on purchase of mineral interest from Hill & Hill in the Conroe Field.

7. a. All of Humble's electric logs in the Conroe Field.

b. All of Humble's core records of wells in the Conroe Field.

c. All of Humble's cross sections of the Conroe Field, if any, prepared after May, 1948.

8. All data showing the physical characteristics of the Conroe Field with respect to sand thickness, porosity and permeability.

9. All written data pertaining to:

a. Water-oil contact.

b. Gas-oil contact in the Conroe Field including the original water-oil contact and gas-oil contact.

"Finding No. 4

"The demand for inspection of plaintiff's books and records, referred to in Finding No. 3, was not made by defendant for the purpose of investigation into the organization, conduct and management of plaintiff corporation; but was made solely for the purpose of ascertaining if plaintiff's files, books and records contained any evidence or information of value to the defendants in the tax suit referred to in Finding No. 1 above, and to obtain access to such evidence and information, if any, and to render such evidence and information available to said defendants if evidence or information of value were found.

"Finding No. 5

"The inspection and examination of plaintiff's files, books and records which followed such demand was made for the sole purpose of obtaining information and evidence for use by the State in the trial of the tax suit, aforesaid.

"Finding No. 6

"Defendant, Price Daniel, did not demand or take the copies of the records listed in Finding No. 3, because, in his judgment, or in the judgment of any of his agents, assistants or representatives such copies showed or tended to show that plaintiff corporation has been or is now engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this state; but such copies were demanded and taken, solely for the purpose of using the same as evidence in the pending tax suit, and, for use in making further investigation as the basis of acquiring additional information for use in the tax suit aforesaid.

"Finding No. 7

"All demands of whatever nature made by defendants, his assistants, agents and representatives, subsequent to the demand of October 7, 1952, were, in truth and in fact, made by them for the purpose of aiding, assisting and supporting the Attorney General in preparing his case for trial in Cause No. 4787 styled Humble Oil & Refining Company, et al, vs. Montgomery County, et al, now pending on the docket of this Court.

"Finding No. 8

"No issue is raised in the tax suit against Montgomery County which would involve plaintiff corporation in a violation of any criminal law of this state; nor is any issue raised involving plaintiff corporation in a violation of any of its charter rights and privileges. On the contrary said cause involves only issues relating to civil relief to which plaintiff corporation contends that it is entitled, under the Constitution and laws of Texas and the United States.

"Finding No. 9

"Plaintiff corporation, through its duly constituted authority, registered with defendant its objections to both the demand for the copies of its records listed in Finding No. 3; whereupon defendant, through his first assistant, thereunto duly authorized, threatened to file a proceeding against plaintiff corporation seeking a forfeiture of plaintiff's charter, under the provisions of and by authority granted in Article 1370, R. C. S. of Texas, unless both the demand for inspection and copying of plaintiff's records were acceded to.

"Finding No. 10

"Such threat referred to in Finding No. 9 involved such drastic penalties as to break down the will of plaintiff's officers to resist such demands so made, and deprived such officers of the right to exercise their own free judgment on the matter of refusing to comply with the demands. In short, plaintiff's officers were led to believe, and in the court's opinion did believe, that if they failed to comply with de-

fendant's demands and through fear of the consequences if they were wrong in their belief that they could lawfully refuse to comply therewith, permitted the Attorney General to impose his will upon them, in lieu of exercising their own free judgment.

"Finding No. 11

"Under fear, as a result of the threat referred to in Findings Nos. 9 and 10 above, the officers of plaintiff corporation permitted the inspection of its books and records demanded by the Attorney General in his letter of October 7, 1952, and the Attorney General's representative was given access to all of plaintiff's books and records as demanded.

"Finding No. 12

"Under such fear, as a result of the threats theretofore made, the officers of plaintiff corporation permitted the copying of the records listed in Finding No. 3, and delivered such copies to the defendant through his representative duly appointed for that purpose; plaintiff's officers at the time of such inspection and at the time of delivering such copies stating to defendant's representative and to defendant himself, that compliance with such demands was under duress and compulsion and with the right reserved of seeking redress through the Courts of this State.

"Finding No. 13

"I find that defendant did intend to bring *quo warranto* proceedings, seeking forfeiture of plaintiff's charter if plaintiff's officers refused to comply with defendant's demands; and I further find that plaintiff's officers believed, in good faith, that such action would be taken, otherwise they would have refused to comply with such demands.

"Finding No. 14

"I find that the facts herein found by me gave rise to a bona fide justiciable controversy, and I find this controversy to be in substance as stated in paragraph "Fifteenth" of plaintiff's original petition filed herein, and that this controversy is so related to and so directly affects the subject

matter of the main suit that it is necessary and proper that it be adjudicated in a proceeding ancillary to said main suit, and that final judgment from which appeal can be perfected be entered in said proceeding.

"Finding No. 15

"I find that the issues involved in this controversy could not efficiently or properly be tried and decided in the course of the trial of the main suit.

"Finding No. 16

"I find that the plaintiff and its officers and agents made no representations to or agreements with the defendant or his agents which caused the defendant, his agents and representatives to change their position in any material respect.

"Finding No. 17

"I further find that the penalty of charter forfeiture is so drastice and severe that it prevented plaintiff's offiers from exerising their own free will, and prevented them from assuming the burden of refusing compliance with defendant's demands, without first appealing to the courts to declare and define its rights, as well as the rights of the Attorney General under Articles 1366-71, R. C. S. of Texas, 1925.

"Finding No. 18

"I find that it would be inequitable and unjust for plaintiff to be required to assume the burden of suffering the possibility of charter forfeiture if its officers be wrong in their belief that they are not required to comply with demands made by defendants under the acts here stated and by me found. In this connection, I find that plaintiff's officers are in good faith in their bona fide belief that the defendant's demands are unauthorized by statute and in excess of defendant's lawful authority.

"Finding No. 19

"The records of which copies were demanded from plaintiff and received by defendant as well as the copies them-

selves are valuable records, constitute, in part, plaintiff's stock in trade, are confidential in nature and are, in truth and in fact valuable property, title to which is vested in plaintiff alone.

"Conclusions of Law

"Conclusion No. 1

"From the above, I conclude that the Attorney General of Texas was acting, at all times, within the powers granted him by law, in demanding the right to inspect and copy the books, records and documents of plaintiff corporation.

"Conclusion No. 2

"The Attorney General having acted within the scope of his lawful powers, the restraining order should be dissolved, the temporary injunction denied, and declaratory judgment entered in accordance with my determination of the law as herein set forth.

"(S.) ERNEST COKER
"Judge Presiding"

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FILED
MAR 17 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 594

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

JOHN BEN SHEPPERD, Attorney General of Texas,
Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The trial court's judgment (without opinion) is set out at pages 24-26 of the Record. The judgment and opinion of the Court of Civil Appeals begins at page 47 of the Record and is unofficially reported at 259 S.W. 2d 580. The Supreme Court of Texas expressed no opinion in this case.

Jurisdiction

This Court does not have, or should not exercise, jurisdiction because:

1. The federal question sought to be raised is not properly presented by this record.

2. The decision of the Court of Civil Appeals rests on non-federal grounds which independently and adequately support it.

3. The federal question sought to be raised is not substantial.

Respondent's arguments in support of these jurisdictional points are made below under the heading "Argument on Jurisdiction and Reasons for Denying Certiorari."

Questions Presented

1. Has this Court jurisdiction to consider an alleged violation of the due process and equal protection clauses of the Fourteenth Amendment

(a) where, prior to its motion for rehearing, petitioner's references to due process and equal protection in its non-specific assignments and arguments before the Court of Civil Appeals are reasonably referable to clauses of the Texas Constitution;

(b) where the Court of Civil Appeals did not expressly consider and determine issues related to the Fourteenth Amendment;

(c) where petitioner never suggested to the Court of Civil Appeals that petitioner's single

reference in its brief to the Fourth Amendment was sufficient to require a determination of rights guaranteed by the Fourteenth Amendment (but, instead, in emphasizing its sole reliance on the Texas Constitution, asserted that the federal constitution does not limit the visitorial power of the state governments); and

(d) where, following a decision by the Court of Civil Appeals containing dictum which did sustain the state statute as no violation of the Fourth Amendment, petitioner failed in its motion for rehearing to specifically assign as error the state court's opinion relating to the Fourth Amendment (but, instead, specifically assigned only the state court's failure and refusal to consider previously unassigned equal protection questions under the Fourteenth Amendment)?

2. Assuming, *arguendo*, that jurisdiction exists, does a state deny due process or equal protection of the law guaranteed by the Fourteenth Amendment when, as a condition to the granting as well as the retention of the privilege of corporate existence, the state reserves to its Attorney General a full and unlimited sovereign power of examination over corporate records such as is reserved in Article 1366, Revised Civil Statutes of Texas?

Statute Involved

The statutes here challenged, Articles 1366, 1367, and 1370, Revised Civil Statutes of Texas, 1925, are quoted in the opinion of the Court of Civil Appeals (R. pp. 60-61).

Statement

The nature and history of this case are accurately summarized in the opinion of the Court of Civil Appeals (R. pp. 47-59). The controversy arose after the Attorney General intervened on behalf of the State in a pending ad valorem tax suit in Montgomery County, Texas, between petitioner, the county board of equalization, and various individual county taxing officers concerning valuation of petitioner's mineral properties in Montgomery County for the year 1950. The State had and has a direct and substantial interest in this valuation dispute because the State ad valorem tax for general revenue purposes was in effect until January 1, 1951 (Tex. Const., Art. VIII, Sec. 1-a; Art. 7048a, V.C.S.*), and because the amount of the State tax in Montgomery County for the year 1950 is governed by the valuation fixed by the county taxing officials. See Fielder, "The Texas Tax Structure—II The General Property Tax," 20 Vernon's Civ. Stat. Anno. VII, XII, XIV (1951). Before the State intervened the issue of valuation in the tax case had been narrowed to one which would be controlled by subsequent proof of true market value of petitioner's property. See *Montgomery County v. Humble Oil & Refining Co.*, 245 S. W. 2d 326, 336 (Tex. Civ. App. 1952, error ref. n.r.e.).

Under the Texas ad valorem tax statutes a corporation, such as petitioner, which rendered its own property for assessment purposes in 1950 was required to render the same *under oath* at its "true and full value" which is defined as "the fair market

*Vernon's Civil Statutes of Texas.

value, in cash, at the place where the property to which the term is applied shall be at the time of assessment . . ." Arts. 7149, 7161, 7162, 7164, 7170, V.C.S. In the belief that Article 1366 conferred an unlimited right to examine petitioner's records and that if an examination should indicate that petitioner's own records "showed or tended to show" false swearing* or any other violation of the tax rendition laws Articles 1368 and 1369 would authorize the taking of copies of such records and the use thereof in the pending tax suit, the Attorney General commenced the examination and subsequent copy taking which were challenged in the present suit for declaratory judgment.

Petitioner's pleadings in the trial court generally alleged the presence of constitutional issues as follows (R. pp. 6-7):

> "2. Plaintiff further contends that any visitation by the Attorney General or his duly authorized representatives or any copying of its records for purposes of obtaining evidence to offer in a civil suit where the State of Texas is a voluntary party as a private litigant, and in which suit only issues of fact and law are involved and only property rights are to be determined, is contrary to the legislative authority granted and constitutes unreasonable search and seizure and denial to plaintiff of due process of law and equal protection of the laws, in contravention of its rights and privileges under the Constitution of the United States and the State of Texas."

*Cf. Parker v. State, 44 Tex. Crim. 147, 69 S.W. 75 (1902).

After trial, the district court concluded and declared that in the instance complained of, the Attorney General "was acting within the scope of his lawful powers in making the various demands for inspection and copying of the records of plaintiff corporation . . ." (R. pp. 25-26.)

The Texas Rules of Civil Procedure state that in non-jury trials such as was conducted in this case, motions for new trial are not required to be made in the trial court in order to preserve or assign error on appeal but that (Rule 374):

> ". . . Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied on on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary."

Rule 418 provides in part:

> "The brief for appellant should contain in the order stated.
>
> ". . .
>
> "(b) A statement of the points upon which the appeal is predicated, separately numbered in short form and without argument . . . Such points will be sufficient if they direct the attention of the court to the error relied upon and they should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief. . . ."

Rule 469(c) concerns preservation of points of error for applications for writs of error from a Court of Civil Appeals to the Supreme Court of Texas. Among other things it says:

> "... If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court."

In the Court of Civil Appeals petitioner relied upon the following point to preserve its constitutional issues for review (R. p. 37):

> "The Trial Court erred in holding that the Attorney General acted lawfully in demanding access to the corporate records of appellant and in taking copies thereof, against appellant's will, under the authority of Articles 1366-1371, for the reason that such statutes are unconstitutional and void."

Local practice permits Texas appellate courts to consider the "statement" and "argument" in the briefs under a given point of error to determine the particular "error relied upon" when the "point of error" itself leaves doubt. The Court of Civil Appeals in this case had before it five "extensive and careful briefs upon the questions involved" (R. p. 59), two by petitioner (appellant below), two by respondent, and one by *amicus curiae*. None of these briefs cites or refers to the Fourteenth Amendment.

Part II of the original, certified transcript contains copies of Appellant's Brief (pp. 1-60), Brief of Appellee (pp. 61-177), Appellant's Reply Brief (pp. 178-201), and Appellee's Response to Appellant's Reply (pp. 202-214).*

Prior to its motion for rehearing, petitioner's single specific reference to the Constitution of the United States in its briefs before the Court of Civil Appeals was to the Fourth Amendment. This reference was made while comparing the terminology of the Fourth Amendment with the search and seizure provisions of Article I, Section 9 of the Texas Constitution. Petitioner's purpose in making this one reference to the federal constitution was stated to the Court of Civil Appeals as follows (Orig. Rec., Part II, p. 17):

> "The two constitutional provisions relating to unreasonable search and seizure are, for all practical purposes, identical, and, while the Fourth Amendment to the Constitution of the United States has no application to State process the Federal decisions have been accepted and frequently cited by our State Courts as an aid in construing the intent and meaning of Section 9, Article I, of the Texas Constitution."

Petitioner's references to due process and equal protection in its briefs before the Court of Civil Ap-

*Petitioner and respondent stipulated and agreed "that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed" (R. p. 102).

peals leave much to be implied as to whether due process and equal protection were preserved for review by appellant's "Point One" and, if so, whether the Fourteenth Amendment or the corresponding clauses of the Texas Constitution was relied on in that court. Article I, Section 3 of the Texas Constitution states that

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

And Section 19 of the same article of the Texas Constitution guarantees that

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Some language in the preliminary "History of the Case" section of petitioner's main brief in the Court of Civil Appeals can be construed to refer to federal due process and equal protection. (See Orig. Rec., Part II, p. 13.) But none of the references to due process and equal protection which appear under the "Supporting Statement to Point One" or the "Supporting Argument to Point One" in Appellant's Brief, and which appear in Appellant's Reply Brief,

are necessarily referable to the Fourteenth Amendment.*

Indeed, most of the final reply argument offered by petitioner in support of its "Point One" in the Court of Civil Appeals would strongly support a conclusion that the only constitutional issue actually relied on for holding these statutes "unconstitutional and void" was the search and seizure argument which petitioner consistently segregated from its due process and equal protection complaints. For example, before it finished in the Court of Civil Appeals petitioner frankly stated (Orig. Rec., Part II, pp. 14, 17, 21, respectively):

> "Appellee's argument fails to recognize the basic attack which we make against the Texas statutes, which is that they seek not merely a search and seizure—but that the vice in the statutes is that they authorize an *unreasonable*

*The following are believed to be all of such references. See Appellant's Brief, Orig. Rec., Part II, pp. 32 ("without due process of law"), 33 ("and the arbitrary copying of appellant's private papers against appellant's will and under duress of unconscionable threats by the Attorney General's office were all in violation of the Texas Constitution and, therefore, unlawful"), R. p. 37-38 ("The statutes under attack prescribe such severe penalties . . . thus depriving those subject to its terms of due process of law and equal protection of the laws of the land"), R. p. 41 ("Such laws have uniformly been held to deny due process of law and equal protection of the law, and to be, therefore, unconstitutional and void"), R. p. 43 ("it has generally been the view of the Bench and Bar all those years that the law, upon proper presentation to the Courts, would be stricken because of its denial of due process of law"); Appellant's Reply Brief, R. p. 43 ("the corporation would still be denied that character of hearing which contemplates due process of law"), R. p. 46 ("sufficient duress to render the statute violative of the equal protection clause of the constitution").

search and seizure and are, therefore, violative of our constitutional safeguards.

". . .

"The question which appellant poses for this Court's determination is whether the examination and copying of records authorized by the statutes under consideration are so broad and sweeping as to be in violation of the constitutional prohibitions against *unreasonable* searches and seizures.

". . .

"Appellee also seeks to make the most of some general statements in some federal cases to the effect that the restraints imposed upon the federal government do not apply to state governments. When these statements are properly understood, appellant has no argument with them. They mean simply that the *federal constitution* does not limit the visitorial power of the state governments. This fact was frankly recognized by appellant in its original brief, at page 12. They mean that in so far as the *federal constitution* is concerned, the states might have unlimited powers of visitation. But as pointed out elsewhere, this has nothing to do with the present case, because the people of Texas, in their constitution, have given corporations, like natural persons, protection against *unreasonable* searches and seizures. In the face of this fact, vague statements by federal courts about what states *could* do are no authority whatever in support of the absolutely unrestrained power which the Attorney General has exercised in this case."

In any event, the Court of Civil Appeals did not expressly consider and determine either state or fed-

eral due process and equal protection issues. Instead, the Court of Civil Appeals, in conformity with appellant's theory in that court that the search and seizure issue and the due process and equal protection issues were distinctly separate, expressly concerned itself with but one part of the first of these constitutional issues—the reasonableness of the search or examination authorized by Articles 1366 and 1367. The potential constitutional issue as to the reasonableness of the seizure authorized by Article 1368 was foreclosed and precluded by the decision of the state court that the Texas Legislature did not intend to confer a copy-taking power on the Attorney General where the copies requested showed or tended to show only violations of ad valorem tax laws (R. pp. 62-67).

Petitioner's three assignments in its motion for rehearing in the Court of Civil Appeals, the substance of which are identical with its "Specifications of Errors" in this Court, did not specifically assign as error any issue pertaining to the Fourth Amendment (R. pp. 69-70; Pet. pp. 22-23).

Argument on Jurisdiction and Reasons For Denying Certiorari

1 and 2

The federal question sought to be raised by petitioner—whether the penalties for failing to immediately permit an examination of corporate records authorized by Articles 1366 and 1367, V.C.S., are so harsh, severe and unconscionable as to violate

the due process and equal protection clauses of Section 1, Fourteenth Amendment to the Constitution of the United States under the doctrine of Ex parte *Young*—is not properly presented by this record because not properly preserved for review in the Court of Civil Appeals. Petitioner's reliance on the Fourteenth Amendment was not brought to the attention of the state court in due time. If the Court of Civil Appeals did believe that due process and equal protection issues were adequately preserved for review, the court's silent determination of those issues must be assumed to have been made with reference to Article I, Sections 3 and 19 of the Texas Constitution. If in fact made, such a decision obviously rests on non-federal grounds which independently and adequately support it. *Bowe v. Scott*, 233 U.S. 658 (1914); *Miller v. Cornwall R. R.*, 168 U.S. 131 (1897); *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112 (1909); *John v. Paullin*, 231 U.S. 583 (1913); *Zadig v. Baldwin*, 166 U.S. 485 (1897). Texas Rules of Civil Procedure 374, 418(b), 469(c); *Fambrough v. Wagley*, 140 Tex. 577, 169 S.W. 2d 478 (1943); *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W. 2d 558 (1948); *Texas State Highway Department v. Fillmon*, 150 Tex. 460, 242 S.W. 2d 172 (1952).

In reviewing the nature and scope of the issues in the trial court, the Court of Civil Appeals apparently construed petitioner's non-specific pleadings as sufficient to raise due process and equal protection issues in the trial court under "both" federal and state constitutions (R. p. 51). In view of this, respondent

concedes the sufficiency of the allegations "in the Court of first instance" (Pet. p. 6) to raise *federal* due process and equal protection issues. Moreover, respondent concedes the truth of petitioner's enthusiastic assertion that its motion for rehearing in the Court of Civil Appeals "fully raised" petitioner's attack under the due process and equal protection clauses of the Fourteenth Amendment (Pet. pp. 8-9). That these things are true is beside the point. Issues raised and decided in the trial court but not properly before a Court of Civil Appeals cannot be considered by it. Texas Rules of Civil Procedure 374, 418(b); *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 579, 210 S.W. 2d 558, 560 (1948). *Cf. Berly v. Sias*, 255 S.W. 2d 505, 508 (Tex. Sup. 1953). And issues raised for the first time in an unentertained motion for rehearing in a Court of Civil Appeals are not subject to review unless, as is *not* the case here, the particular assigned error originated in the Court of Civil Appeals. Texas Rule of Civil Procedure 469(c); *Texas State Highway Department v. Fillmon*, 150 Tex. 460, 463, 242 S.W. 2d 172, 174 (1952); *Yates v. Darby*, 133 Tex. 593, 604, 131 S.W. 2d 95, 101 (1939). These fundamental rules have been applied in numerous decisions of this Court, including those cited in the next preceding paragraph. See also *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

Petitioner openly admits that the Court of Civil Appeals "failed and refused to consider and pass on its attack" under the due process and equal protection clauses of the Fourteenth Amendment (Pet. p. 8). Thus, the controlling jurisdictional issue is whether petitioner properly presented this "attack"

in its original submission in that court. Obviously, petitioner's "Point One," claiming only that the statutes are "unconstitutional and void," was insufficient to invoke the Fourteenth Amendment or any other federal constitutional claim. However, as observed previously, the Texas practice is extremely liberal. If petitioner's "Point One" was sufficient to direct the court's attention to the matter complained of, "the [Texas] Court will look to the 'point' and the statement and argument *thereunder* to determine the question of reversible error. Simply stated, the Court will pass on both the sufficiency and the merits of the 'point' in the light of the statement and argument *thereunder*." *Fambrough v. Wagley*, 140 Tex. 577, 585, 169 S.W. 2d 478, 482 (1943) (Emphasis added).

But even assuming that this Court were willing to indulge such liberality to parties seeking to preserve federal questions, still, petitioner is not assisted. For at no point in 44 pages of "Supporting Statement" and "Supporting Argument" to its "Point One," comprising the greatest part of two separate briefs, is there a single reference to the Fourteenth Amendment or to due process or equal protection guarantees not logically referable to Sections 3 and 19 of Article I of the Texas Constitution.

The present instance well illustrates why this Court should not sanction so imprecise a procedure for preserving federal questions for review here, even though state courts with lesser dockets and with their own special problems of judicial administration deem such a rule sufficient for their purposes. It should be enough to read the briefs prepared for this

Court without first having to read all the briefs filed in the state courts to see if a federal question was actually raised in the state court. The Texas "point of error" practice is entirely adequate to permit parties to definitely and precisely raise both federal and state due process and equal protection questions (as well as Fourth Amendment questions) without resorting to briefs and arguments in the state courts. *E.g., Angelina & N.R.R.R. v. Railroad Com'n*, 246 S.W. 2d 928, 930 (Tex. Civ. App. 1952). Therefore, there is ample reason and precedent for this Court to refuse to consider any part of petitioner's briefs in the Texas courts other than the part thereof containing its "points of error." *Zadig v. Baldwin*, 166 U.S. 485, 488 (1897). *Cf. Lynch v. New York*, 293 U.S. 52, 54 (1934); *Live Oak Water Users Ass'n v. Railroad Com'n*, 269 U.S. 354, 358 (1926); *New York C. R. R. v. New York*, 186 U.S. 269, 272 (1902).

In view of petitioner's obvious reliance in the Court of Civil Appeals on the "search and seizure" clause of the Texas Constitution rather than the Fourth Amendment, it is not surprising that petitioner failed to specifically assign error related to the Fourth Amendment in its motion for rehearing in the Court of Civil Appeals. At that time petitioner believed that the Fourth Amendment "has no application to state process." Petitioner's first two assignments in that motion specifically complain only of a "fully raised" Fourteenth Amendment question and, since petitioner claims that Fourteenth Amendment as well as Fourth Amendment issues were properly before the state court on original submission, it is

just as reasonable to interpret its generalized "Third" assignment as another try at the Fourteenth Amendment as it is to read it as a Fourth Amendment complaint.*

Petitioner maintains a large legal staff and has been represented in this litigation by numerous able and prominent attorneys. Certainly it should not expect to obtain a review in this Court based on implied, inferred or surmised compliance (if any) with the jurisdictional standards of the Court, even though such standards are occasionally relaxed on behalf of persons "unlearned in the law." *E.g., Price v. Johnson*, 334 U.S. 266, 292 (1948). Nor can these jurisdictional deficiencies be overlooked because it would have been very simple for petitioner's counsel to have included a direct reference to the Fourteenth and Fourth Amendments where necessary to preserve fed-

*That petitioner did not intend, and therefore did not rely on, its Fourteenth Amendment assignments in its motion for rehearing to preserve "search and seizure" issues for review in this Court is clear from petitioner's consistent treatment of those issues in the lower courts as being entirely distinct and separate. For example, long after the assignments in question were filed, petitioner stated to the Supreme Court of Texas (Orig. Rec., Part I, p. 199): "Needless to say the 'unreasonable search and seizure' clause of the Fourth Amendment and the 'equal protection' clause of the Fourteenth Amendment, raised *two* different constitutional questions—and a disposition of the former does not have the effect of disposing of the latter. A statute may meet the requirements of one and, therefore, not violate constitutional guarantees thereunder, yet may contravene the provisions of the other, and, therefore, be void on constitutional grounds."

Compare petitioner's change of tune before this Court (Pet. p. 27): "The provisions of the search and seizure clause and the due process and equal protection clauses of the Federal Constitution give rights which are interrelated in character . . ."

eral questions for review. Such references were not made. It is only fair to assume that petitioner had its own reasons for not doing so, as it must be understood to have reasons sufficient to itself for seeking certiorari rather than appealing the decision of the state court.

3

The federal question sought to be raised by petitioner is not substantial. Petitioner's position seems to be, first, that the officers of a private corporation have a right under the Fourteenth Amendment to "exercise their own free will and judgment" on whether to resist an examination by the state of confidential records of the state's own corporate creature. Second, petitioner asserts the view that the Fourteenth Amendment entitles private corporations to some kind of prior judicial determination of the constitutional reasonableness of any given demand for examination if the corporate officers are inclined to resist. And lastly, petitioner claims that the corporation's constitutional rights become "a farce, a sham, a tragic hoax" when the will to resist examination is "broken" by the fact that such resistance constitutes grounds for judicial challenge by the creating state of the resisting corporation's continued right to exist.*

*It is true that Article 431, Revised Penal Code of Texas, 1925, makes it a crime for individual corporate officers to resist examination and provides penalties of fine and imprisonment upon conviction. However, the validity of these individual penalties was not raised by the facts of the present case. If such penalties are ever invoked, or their enforcement "threatened," their constitutionality will become subject to determination.

But petitioner is unable to point to any constitutional interpretation supporting its position that resistance to an exercise of a full power of sovereign or public visitation over private corporations cannot be delegated by the legislature to an executive officer or that the creating state cannot make the exercise of this power "ex parte," that is, conditioned upon administrative discretion rather than prior judicial sanction as under a judicial subpoena. Nor does petitioner cite any decision by this Court indicating that charter forfeiture by a judicial action of the state in the nature of quo warranto is not an appropriate penalty for resisting or refusing sovereign visitation.

Petitioner's statement (Pet. p. 27) to the effect that there are no other valid visitorial statutes "as broad as" the Texas statute needs qualification. Respondent agrees that Article 1366 is broader than most other statutes in this country in the sense that it makes *all* private corporations chartered or permitted to do business in Texas subject to the full measure of sovereign visitorial power rather than making only certain kinds of corporations so subject. But petitioner's implication that no other valid statute is "as broad" in the sense that no other statute authorizes an executive officer, without prior judicial sanction, to exercise a full and unlimited sovereign power of examination over corporate records, and that no other statute makes refusal or resistance to such a visitation grounds for charter forfeiture, is utterly without substance. Undoubtedly, the most familiar example of the exercise of a full and unlimited "public right" of sovereign visitation by ex-

ecutive officers *without prior judicial sanction*, resistance to which has always been punishable by *charter forfeiture*, is the power of examination exercised over banking corporations. *E.g.*, R.S. 5240, 12 U.S.C. §§ 481-484. See *Guthrie v. Harkness*, 199 U.S. 148, 158-159 (1905).

Respondent is aware that in most instances Congress and the state legislatures have not seen fit to delegate to the law enforcer a full, unlimited and "general" power of investigation over corporate records independent of prior judicial approval through subpoena, search warrant or otherwise. But the decisions of this Court have consistently recognized that "the reserved right in the legislature to investigate" into the affairs of corporate creatures of the state is founded on a principle entirely distinct from "the inherent and necessary power of the federal and state governments to enforce their laws" which affect natural persons and corporations alike. See *United States v. White*, 322 U.S. 694, 701 (1944); *Hale v. Henkel*, 201 U.S. 43, 74 (1906).

The bases for this full power over corporate creatures being unique, the reasonableness of its exercise cannot properly be determined according to concepts associated with protection of the rights of natural persons or strictly in accordance with standards designed to govern powers of examination for more limited purposes. *Cf. Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 43 (1900); *Federal Trade Com'n v. American Tobacco Co.*, 264 U.S. 298, 306 (1924); *Federal Trade Com'n v. Baltimore Grain Co.*, 284 Fed. 886, 889 (D. Md. 1922), *aff'd per curiam*, 267 U.S. 586 (1924); *United States v. Bausch & Lomb*

Optical Co., 321 U.S. 707, 725, 726 (1944); *Culver v. Smith*, 74 S.W. 2d 754 (Tex. Civ. App. 1934, error ref.). Since the full power of public visitation over private corporations is a prerogative of the legislative branch when it has created or permitted corporations to exist, certainly it is for that branch of the government to decide whether such power should be delegated, the extent to which it should be delegated, and the conditions under which it should be delegated, including, of course, decisions as to whether each examination must be approved in advance by the judicial branch and whether resistance or refusal by a corporation to permit examination should constitute grounds for charter forfeiture.

The "cumulative penalty" doctrine relied on by petitioner has never been and was never intended to be applied as a limitation on the power of a legislature to deal with a subject, such as sovereign visitation of private corporations, over which "the jurisdiction of the legislature is complete." Ex parte *Young*, 209 U.S. 123, 147, 148 (1908). For if the doctrine were applicable, to borrow from another relevant* context the language of Justice Harlan, "the power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed." *Hale v. Henkel*, 201 U.S. 43, 77, 78 (concurring opinion).

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*Cf. United States v. Morton Salt Co., 338 U.S. 632, 651 (1950) ("It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment.").

In *Deitrick v. Creaney*, 309 U.S. 190, 195 (1940), the Court observed with no apparent alarm that Congress has authorized and required the Comptroller of Currency to periodically exercise the full measure of sovereign visitation over national banking associations under conditions comparable to those specified in Articles 1366 and 1370, and pointed out that

> "The provisions of the Act requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the Act and in that event prompt remedial action by the Comptroller."

In Texas it is the responsibility of the Attorney General, under Article IV, Section 22 of the state constitution, to especially inquire into the charter rights of "all private corporations," to take proper and necessary preventive action in the courts, and to seek charter forfeiture when sufficient cause exists. The Texas Legislature in 1907 found that there then existed "no adequate law" authorizing the Attorney General to examine the records of all corporations, and Articles 1366-1371 were enacted to grant "absolutely necessary powers to officers charged with the execution of the laws." Acts 30th Leg., R.S. 1907, Ch. 21, Sec. 8, p. 36; Orig. Rec., Part II, p. 76.

The legislative history of the challenged statutes shows not only a clear purpose to "insure prompt discovery" of all possible corporate violations of law and "prompt remedial action" by the Attorney General and other state law enforcers. That history also reveals the particular concern of the legislature with providing effective legal supervision and control of

giant oil corporations covering "the whole country" and capable of shifting "all incriminating evidence before you have examined the end of one small pinnacle." Orig. Rec., Part II, pp. 162, 80-82, 157-159, 165-170. Perhaps that history, showing as it does the prominent role of the Standard Oil Company's then-existing Texas affiliate in bringing about enactment of the Texas visitorial statute, serves also to explain this petitioner's special and notorious "irreconcileability" with the far-reaching sovereign authority delegated to the Attorney General by the Thirtieth Texas Legislature.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 17, 1954